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Summary record of the 3561st meeting
Held at the Palais Wilson, Geneva, on Tuesday, 30 October 2018, at 10 a.m.

Chair: Mr. Fathalla (Vice-Chair)
later: Mr. Shany (Chair)

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Mr. Fathalla (Vice-Chair) took the Chair.

The meeting was called to order at 10.05 a.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*)

1. **The Chair** invited the Rapporteur to present the final version of the text of general comment No. 36 on the right to life, which had been distributed to members without a symbol.

2. **Mr. Shany** (Rapporteur for the general comment) said that the final text contained all the paragraphs approved by the Committee. The order of paragraphs 38 and 39 had been reversed and, at Mr. de Frouville's suggestion, he had added references in the footnotes to three recent cases that formed part of the Committee's jurisprudence, namely *Toussaint v. Canada*, *Ambaryan v. Kyrgyzstan* and *Khadzhiyev v. Turkmenistan*.

3. It had been a long journey from the decision in March 2015 to draft a new general comment on the right to life to the finalization of the text following its second reading at the current session. Perhaps one of the lessons to be learned and applied to the formulation of the next general comment was that an effort should be made to complete the text within a two-year timespan so that the same members would be involved in the deliberations from start to finish. That being said, it had in fact been helpful to have the benefit of the fresh perspectives of new members, along with those provided by all the stakeholders that had provided such valuable comments. The final document constituted the very impressive fruit of a collective effort. He therefore trusted that it would prove to be a valuable normative statement for future generations.

4. A special debt of gratitude was owed to the initial co-rapporteur, the late Sir Nigel Rodley. The general comment had been his brainchild, and it was to be hoped that it captured his unwavering commitment to the cause of human rights, his profound humanitarian sensibility, his commitment to legal discipline and his realism. It addressed at length many of the issues which had been dear to his heart: the right to life as a supreme right emanating from human dignity, the need to progress towards the abolition of the death penalty and the importance of accountability and of the protection of the lives of prisoners and human rights defenders.

5. The general comment would make a substantial contribution to international human rights law. It rested on the Committee's understanding that human rights were indivisible, interdependent, interrelated, universal and inalienable. It conveyed the message that the protection of the right to life must not be narrowly construed, and it provided a firm basis for the application of article 6 of the Covenant both within and outside the territory of a State party, as was fitting in an era of globalization. It framed the right to a life with dignity within both negative and positive human rights obligations and focused not only on rights, but also on the institutional requirements for the provision of protection against violations. The general comment gave voice to the Committee's conviction about the fundamental importance of the right to life and the duty of all States to respect and safeguard it.

6. **The Chair** said that he took it that the Committee wished to adopt the general comment by consensus.

7. *It was so decided.*

8. **The Chair** gave the floor to members who wished to make a statement concerning the general comment.

9. **Ms. Pazartzis** said that she wished to commend the Rapporteur on his outstanding work and to pay tribute to Sir Nigel Rodley, who had been the driving force behind the drafting of the general comment. The value of the general comment lay in the fact that it codified the Committee's existing jurisprudence and practice pertaining to article 6 of the Covenant. The Committee's work regarding many aspects of the right to life had evolved and become more fully developed since the adoption of general comments Nos. 6 and 14 in 1982 and 1985, respectively, and the new general comment captured those developments. In view of the fundamental nature of the philosophical aspects involved in the right to life, the

Committee members had striven to arrive at a text embodying a careful balance of codification and progressive development which provided for the possibility that the interpretation of article 6 might yet evolve further in the future.

10. **Mr. Heyns** said that it had been a great joy to be part of a process which had reconfirmed his faith in the United Nations system. The document's legitimacy stemmed from its quality and coherence in the way that it addressed the fundamental nature of the right to life. It had countered the idea that international law was retentionist by offering a number of arguments that could be cited in advocating the progressive abolition of the death penalty. Its emphasis on extraterritorial application and procedural elements would be highly influential, and the document would serve as a lodestar for the overall approach to the right to life for many years to come.

11. **Mr. de Frouville** said that he was sure that Sir Nigel Rodley would have been proud of the outcome of the Committee's work on the general comment. He wished to commend the Rapporteur on his open-mindedness and skilful conduct of a debate that had taken place against the background of a climate in which fear generated by a lack of security was increasingly taking precedence over a concern for human rights. The Committee had risen to the challenge of dealing with the death penalty, the voluntary termination of pregnancy and weapons of mass destruction, in particular nuclear weapons. General comment No. 36 also successfully covered topical questions such as extraterritorial accountability and measures to reduce threats to the right to life posed by such conditions as violence and epidemics and a lack of access to water, adequate nutrition or essential medicines. In the current atmosphere of spreading gloom, the link forged between articles 6 and 20 of the Covenant and the obligation placed on States to ban war propaganda and hate speech were of stellar importance.

12. **Ms. Kran** said that the general comment codified the Committee's jurisprudence and provided a basis on which States parties could consolidate respect for the right to life. She hoped that it would be widely publicized by the Committee members, the secretariat, academics and civil society so that it might fulfil its purpose and have a tangible impact in terms of the protection of the right to life.

13. **Mr. Politi** said that the adoption of the general comment was an outstanding achievement. Its purpose was not only to restate the jurisprudence of the Committee but was also to provide a key instrument for interpreting the relevant provisions of the Covenant and to advance the continuing development of human rights law. He wished to highlight the provisions in the general comment that supported the abolition of the death penalty and the way in which the general comment connected the right to life to international environmental law, international humanitarian law and specifically the abolition of weapons of mass destruction. It was an extraordinary and fitting circumstance that the adoption of the general comment coincided with the celebration of the seventieth anniversary of the Universal Declaration of Human Rights.

14. **The Chair**, speaking in his capacity as a member of the Committee, said that he concurred with the sentiment expressed by Mr. Politi; the adoption of the general comment was indeed an outstanding achievement, made possible by the combined efforts of all members of the Committee, past and present. While it had taken a great deal of time to adopt general comment No. 36, the length of the Committee's deliberations had been wholly appropriate given the importance of its subject matter. He wished to commend the co-Rapporteurs, without whose leadership the level of compromise inherent in the general comment would not have been possible. A notable area of compromise for him, as a member, had been the issue of the voluntary termination of pregnancy, which was addressed in the paragraph on the termination of pregnancy, particularly the formulation: "States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion." In his opinion, that implied that abortion should be legalized without restriction, which, in de facto terms, denied unborn children their right to life and contradicted the principle that the right to life was the supreme right from which no derogation was permitted, as established in paragraph 2. Permitting abortion with no restrictions entailed the prioritization of the principles of privacy and freedom of choice over the right to life.

15. **Mr. Ben Achour** said that the current meeting was a celebration of the adoption of the general comment; it was not the appropriate moment to criticize the general comment based on a personal opinion. If all members were to express their views on individual paragraphs, the meeting would be interminable.

16. **The Chair** said that all Committee members were at liberty to comment on specific paragraphs if they so wished. The general comment had been adopted by consensus; he simply wished to have his personal view stated for the record, which was his right as a member of the Committee.

17. **Mr. de Frouville** said that he agreed with Mr. Ben Achour; the current meeting was not the moment to offer criticism based on an individual's personal position on given issues. He, too, had his reservations about certain paragraphs and might well have wished to air them during the present meeting. Nevertheless, the Committee members had not been invited to express their reservations; they had been invited to make general remarks, which is what they had done, even when mentioning specific paragraphs of the text. It was important for all members to observe the same rules.

18. **Mr. Koita** said that drafting the general comment had been a balancing act; it had been necessary to seek out common ground on which persons of good faith could unite. He had become convinced of the merit of the Committee's working methods when he saw how the Committee had managed to produce a text in which it connected the right to life with the preservation of the environment, the abolition of weapons of mass destruction, the eradication of poverty and the right to live in decent conditions. He had learned a great deal from the process and was grateful to the rapporteur for his excellent work.

19. **Ms. Cleveland** said that she agreed with the comments of the members who had spoken before her, with the exception of those of Mr. Fathalla, who, she believed, had egregiously abused the spirit of the meeting and his role as its Chair. The general comment was an ambitious one, and drafting it had advanced the Committee's understanding of a wide swathe of issues relating to the right to life. The end product of the collaborative process involved in drawing up the general comment would not have been the same without the wide-ranging expertise of the Committee members and the contributions of external stakeholders and the secretariat. She felt privileged to have worked with such an august group of colleagues and thanked them for their important and lasting contribution to the cause of human rights.

20. **Mr. Muhumuza** said that he, too, would have appreciated the opportunity to express his opinion on specific aspects of the general comment but would refrain from doing so given the apparent outrage that the remarks made by the Chair in his capacity as a member had provoked. The reaction to those remarks had been unfair: giving members the freedom to express their views about the general comment surely meant allowing them to criticize or commend it, as they saw fit. For example, he would have liked to comment on inflammatory rhetoric that incited attacks on the right to life. Instead, he would take the opportunity to congratulate all those who had worked to bring about the general comment. The text represented a consensus. As befitted the nature of consensus, some members would continue to disagree on certain matters. Nevertheless, the final version of the general comment was a reflection of the spirit of democracy.

21. **Mr. Santos Pais** said that he wished to join his colleagues in commending the skilfulness of the rapporteur. One of the most important lessons he had learned from the process had to do with the importance of receiving a broad array of inputs from many different stakeholders outside the Committee. Indeed, the adoption of general comment No. 36 had been made possible by the support of a great number of interested parties. The drafting process had been difficult, but rewarding, and it had been a privilege to work on such an important document.

22. **Mr. Zimmermann** said that he felt privileged, as a new member of the Committee, to have been able to add his voice to the consensus on the general comment as the drafting process came to a close, although, admittedly, his views on some of the issues addressed in the document might have been at variance with the agreed position. It was important for the general comment to be considered in conjunction with the general framework of international law. He hoped that States parties would take due note of the Committee's work.

23. **The Chair** said that he wished to reiterate that he had not abused his position as Chair; he had made it clear that, in expressing his views on the general comment, he was speaking as a member of the Committee.

24. **Ms. Waterval** said that she, too, would like to congratulate the Committee on the adoption of the general comment and pay homage to the late Sir Nigel Rodley for his considerable contribution.

The meeting was suspended at 11.15 a.m. and resumed at 11.45 a.m.

25. *Mr. Shany took the chair.*

General discussion in preparation for general comment No. 37

26. **The Chair** said that he now wished to invite members to offer their thoughts on what the topic of the Committee's next general comment might be. It was important to bear the scope of any potential subject in mind, since it was hoped that work on the next general comment could be concluded within a two-year timespan. Before ultimately choosing article 6, on the right to life, the Committee had given serious consideration to two other possible topics for general comment No. 36: article 17, on the right to privacy, and article 21, on the right to peaceful assembly. Article 17 was quite broad in scope; however, should the Committee wish to make it the subject of the next general comment, the Committee could choose to limit its work to the application of the article in, for example, digital contexts. On the other hand, it had been suggested that a general comment on article 21 might be broadened to include the provisions of article 22 on the right to freedom of association. The Committee should nonetheless not feel bound by those previous proposals; members were encouraged to take a fresh look at the Covenant for inspiration.

27. **Mr. de Frouville** said that, of the articles of the Covenant that had yet to be addressed in a general comment, articles 21 and 22 appeared to be the most suitable candidates. They were broader in scope than the other options, and the Committee had a wealth of relevant jurisprudence to work with. Furthermore, the rights to peaceful assembly and freedom of association were particularly topical at a time when individuals were facing increasing restrictions on their civil liberties. Indeed, a series of worrisome amendments had been introduced into the laws of numerous countries over the previous four years that had made it almost impossible for people to exercise their rights.

28. There were also 12 general comments that were over 10 years old and that had never been updated, including general comment No. 16 on article 17 on the right to privacy. The Committee might wish to update that general comment in the near future, particularly in the light of recent developments concerning new technologies. However, those developments did not have an impact in all the areas covered by article 17. He therefore wondered whether that would make an appropriate subject for a general comment or whether it might be more appropriate to deal with the impact of new technologies on the right to privacy in a different way, for example in the form of a joint declaration made with another treaty body.

29. **Mr. Heyns** said that a general comment was a restatement of the Committee's jurisprudence. To his mind, although there was a need to engage with issues relating to privacy in digital contexts, the Committee did not yet have enough relevant jurisprudence to devote a general comment to that topic. The issue of rights in the civic space was another interesting subject, but it was very broad in scope and would surely entail a lengthy drafting process.

30. On the other hand, the Committee had a great deal of jurisprudence relating to the right to peaceful demonstration, and the next general comment could serve as an excellent opportunity for clarifying how the provisions of article 21 interacted with other provisions of the Covenant. Furthermore, no documents on the right to peaceful demonstration had been produced at the regional or international level that carried the weight of a general comment. The Committee's jurisprudence covered a host of issues that arose before, during and after a peaceful demonstration. A general comment on that subject would also offer the chance to further engage with the impact of new technology in that sphere, including the use of body cameras and less-lethal weapons. By taking on both articles 21 and 22, the Committee risked broadening the scope of the general comment too far. He therefore supported the selection of article 21 as the sole subject of the next general comment.

31. **Ms. Cleveland** said that she wished to urge the Committee to take up both articles 21 and 22 for the general comment. Although the Committee had less jurisprudence relating to article 22 from its Views on individual communications, it was increasingly referring to the right to freedom of association in its concluding observations. Around the world in recent years, a series of pointed attacks had been carried out on the civic space, and a number of States had adopted increasingly egregious restrictions on the work of non-governmental organizations (NGOs), civil society organizations and political parties. The Committee relied on such entities to make its work effective and to push for relevant amendments to domestic legislation. At a time when those bodies were looking for guidance as to how to deal with the new restrictions being placed on their work, the Committee could make a real difference by gathering its jurisprudence and experience on those issues together in one place. Articles 21 and 22 were compatible subjects for the same general comment because they both addressed the rights of individuals to collectively engage in expressive activity. They also contained a number of very similar provisions, particularly regarding possible limitations on those rights.

32. **Mr. Santos Pais** said that he supported the proposal to deal with articles 21 and 22 in the general comment because they contained many common elements, and issues covered by those two articles were often raised together in the Committee's dialogues with States parties. As well as being interrelated, the rights protected under those two articles also overlapped with the rights set out in several other articles of the Covenant, some of which had been the subject of general comments that had become outdated. A new general comment would therefore offer an excellent opportunity to provide updated examples of the ways in which those rights interacted with the rights dealt with in articles 21 and 22. Although it would evidently take more time to address the rights to both peaceful assembly and freedom of association in the same general comment, the Committee would ultimately save time by dealing with two articles in a single body of work.

33. Another consideration was that the issues related to the right to privacy were evolving so quickly that, should the Committee choose to take up article 17, it would run the risk of producing a general comment that would already be outdated by the time that it was published. Regional data protection commissions had already been established to deal with privacy issues in digital contexts and, in some respects, it was questionable how much impact a general comment from the Committee would have in that area. For example, it was hard to imagine that the publication of a general comment would prevent States from continuing to gather data from outside their own borders on foreign nationals.

34. **Mr. Ben Achour** said that he did not support the idea of dealing with articles 21 and 22 in the same general comment. Article 21 raised a number of major problems because, contrary to the majority of legal systems around the world, it drew no distinction between the right to peaceful assembly and the right to demonstrate. If the general comment were to deal with two articles, it would make more sense to couple article 22 with article 25. The latter set out the right of every citizen to take part in the conduct of public affairs directly, which entailed giving citizens the power to freely associate with others and to establish associations. A clear link could be drawn between that right and the participation of civil society organizations, NGOs and political parties in public affairs. Article 25 was therefore a more natural choice to be twinned with article 22 on the right to freedom of association.

35. However, his preferred option would be for a general comment dealing solely with article 25. Much of the Committee's jurisprudence from concluding observations and Views on individual communications referred to the incompatibility between domestic constitutional law and the provisions of article 25. To his mind, the fact that article 25 regularly appeared to conflict with public law made it a worthy candidate for the next general comment.

36. **Ms. Brands Kehris** said that article 17, on the right to privacy, raised highly important issues that were linked, in particular, to new technology. The Committee's jurisprudence on those issues was likely to develop in the near future, but it was currently unsuitable as a subject for a general comment. She was broadly in favour of focusing on article 21. The Committee had already considered at least 70 communications concerning alleged violations of that article, and the fact that the Internet and other social media were shining a light on evolving aspects of the freedom of assembly was an important consideration. A general comment on article 21 would certainly raise issues connected with

articles 19, 22, 25 and 26. She had some doubts, however, about the desirability of developing a combined general comment on articles 21 and 22.

37. **Ms. Pazartzis** said that her preference was for a general comment on article 21, given the scale of the Committee's jurisprudence on the subject and the importance of the issue of the restriction of civil liberties in public spaces. She was not opposed to a general comment on both articles 21 and 22, but if the Committee hoped to speed up its adoption procedure, it would be wiser to focus on a single article and to simply cross-reference certain aspects of other articles.

38. **Ms. Kran** said that there was a vital need to address both the right to freedom of assembly and association under articles 21 and 22 and the right to privacy under article 17. Civil society played a crucial role in advancing and protecting human rights. The right to privacy was subject to large-scale violations in the context of rapid advances in surveillance and other technologies. As it was difficult to decide which issue was more pressing, other factors should be taken into account, such as the coverage of previous general comments.

39. Pressure on civil society had been ramped up, and repressive and violent methods had been used to silence critical voices around the world. The right of peaceful assembly and the right to freedom of association served as a key vehicle for civic activity conducive to democratic governance and sustainable development. Many United Nations bodies, including the Human Rights Council, had sounded the alarm about a significant deterioration in the observance of those rights in all regions and had encouraged the treaty bodies to address the problem pursuant to their mandates. Inputs could be obtained from the Special Rapporteur on the rights to freedom of peaceful assembly and of association and from the Special Rapporteur on the right to privacy, and the United Nations High Commissioner for Human Rights had issued a report that presented practical recommendations for the creation and maintenance of a safe and enabling environment for civil society (A/HRC/32/20). The wealth of legal reference material available to the Committee provided a convincing argument for a general comment on article 21, article 22 or both. Economies of scale could be achieved by addressing both articles, since their subject matters were closely linked. Another key factor was the existence of internal expertise on the subject.

40. **Mr. Zimmermann** said he agreed that it was preferable to focus on articles 21 and 22 rather than on article 17. The right to privacy was crucial in the digital era but required a deep understanding of technical matters and technological issues, such as those posed by attribution metadata, for example. As the wording of the second sentence of article 21 concerning restrictions on the right of peaceful assembly and the wording of the first sentence of article 22 (2) concerning the right to freedom of association were identical, the interpretation of such restrictions should serve as guidance for the implementation of both articles.

41. **Mr. Politi** said that he was inclined to support a general comment on both articles 21 and 22 on substantive grounds rather than on the basis of other considerations, such as the lack of any previous general comment or the existence of a sufficient body of jurisprudence, which were valid but not compelling reasons, in his opinion. With a view to the future, however, he would like to point out that, while it was true that there was relatively little jurisprudence regarding article 17 and that rapid technological development posed a challenge in terms of the timeliness of a general comment, the article addressed many other issues which had been covered in a number of communications. Furthermore, technology would continue to advance at an exponential pace and that should not prevent the Committee from issuing a general comment on any given article.

42. **The Chair**, speaking as a member of the Committee, said that he wished to associate himself with that position. It was important to develop expertise and generate jurisprudence on article 17. Although technology was developing at top speed, the Committee must seek to adopt relevant positions on matters that would pose challenges for present and future generations. Nonetheless, since the Committee hoped to frame the next general comment within a two-year timespan, it would be inadvisable to grapple with such an extremely difficult area of international human rights law, despite the increasing amount of jurisprudence that was being developed on issues such as surveillance. For similar reasons, he would prefer to focus on article 21 rather than combining it with article 22.

43. **Mr. Fathalla** said that, in his view, it was important to address both article 21 and article 22; such a general comment would complement general comment No. 34 on article 19 concerning the freedoms of opinion and expression.

44. **Ms. Abdo Rocholl** said that she would prefer to focus on article 17, since so many Governments were currently breaching people's privacy by obtaining their personal data, especially in the case of vulnerable groups. She would nonetheless support the decision to produce a general comment on article 21.

45. **Ms. Waterval** said that she would opt for a general comment on both article 21 and article 22.

46. **The Chair** said that there appeared to be a strong preference for a general comment either on article 21 or on articles 21 and 22, but there did not seem to be a clear majority in favour of either option. He would like to know whether the Committee was willing to proceed to a vote.

47. **Mr. de Frouville** said that a vote was unnecessary. He proposed that the Committee should first ascertain which members were candidates for the office of rapporteur and then undertake a preliminary study on the appropriateness of a separate comment on article 21 or a combined general comment on articles 21 and 22. The final decision could be taken at the next session, if necessary on the basis of a vote.

48. **The Chair** said that it would be preferable to take a decision at the current session in order to ensure that the general comment could be adopted within the next two years. The decision to produce a general comment on article 6 had been based on a vote.

49. **Mr. Heyns** said that he agreed with Mr. de Frouville that the Committee should ascertain who was willing to serve as rapporteur before taking a final decision.

50. **Mr. Fathalla** proposed that the next rapporteur for a general comment should decide whether to focus on article 21 or to combine articles 21 and 22.

51. **The Chair** suggested that the Committee should decide in principle to produce a general comment on article 21 and leave open the possibility of combining it with another article. It could then hold consultations on the appointment of a rapporteur, take into account the rapporteur's position on the articles to be addressed and then arrive at a final decision at the current session.

52. **Mr. de Frouville** said that the procedure for adopting the general comment could be expedited if Committee members familiarized themselves with the issues to be raised before the draft was submitted for discussion.

53. **The Chair** said that internal discussions and consultations with stakeholders could be held at the next session, and he agreed with Mr. de Frouville that the choice of the next rapporteur and his or her areas of expertise had an important role to play in determining the focus of the next general comment.

The meeting rose at 1 p.m.